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# Sports Violence: A Matter of Societal Concern\*

## I. Introduction

In a recent National Hockey League (NHL) game between the Boston Bruins and the New York Rangers, a fight broke out among the rival players. Without provocation, a Ranger fan reached over the protective glass and punched a Bruin player. Within a matter of seconds, several Bruin players ascended into the stands to avenge their teammate. With fists and hockey sticks flying, the confrontation between players and spectators continued for more than fifteen minutes.<sup>1</sup>

During another NHL game, Henry Boucha, of the Minnesota North Stars, and Dave Forbes, of the Boston Bruins, had been sent to the penalty box for fighting. As Boucha skated towards his team's bench at the expiration of the penalties, he was attacked by Forbes who struck him in the face with the butt end of his hockey stick and pummeled him with his fists after he had dropped to the ice.<sup>2</sup> Remedial surgery was required to relieve Boucha's double vision in what NHL President Clarence Campbell termed "one of the most vicious incidents that he had been called to deal with."<sup>3</sup>

In a National Basketball Association (NBA) game between the Houston Rockets and the Los Angeles Lakers, the Rockets' Rudy Tomjanovich rushed to break up a fight between one of his teammates and the Lakers' Kermit Washington. As Tomjanovich approached the pair, Washington whirled and hit him with a punch which resulted in fractures of the face and skull, a broken nose, a separated upper jaw, a cerebral concussion and severe lacerations around the mouth. In effect, the bone structure of his face was knocked loose from his skull.<sup>4</sup>

While the Steelers' Terry Bradshaw was completing a pass to Franco Harris in a National Football League (NFL) game between the Pittsburgh Steelers and the Oakland Raiders, some fifteen yards away the Raiders' George Atkinson rushed up behind an unsuspecting Lynn Swann and hit him with his forearm at the base of the helmet. Swann collapsed, suffering a concussion and putting him out of action for the next two games.<sup>5</sup>

These incidents have a common element, unrestrained and needless violence in the context of professional athletic competition. Such violence in professional sports may have an effect on the larger society. "Violence of any kind, whether physical violence, a violent disregard for the rules, or just a momentary violent human reaction to an unexpected movement, is a strong creator of lasting images."<sup>6</sup> Sadly enough, the examples given here represent a

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\* The author dedicates this Note to the Rev. Edmund P. Joyce, C.S.C., whose twenty-eight years of guidance to the athletic programs at this institution have assured that sportsmanship will always be the rule and never the exception at Notre Dame. C.J.R., June 1, 1980.

1 See *Scorecard*, SPORTS ILLUSTRATED, Jan. 7, 1980, at 9.

2 See Mulvoy, *Hockey Is Courting Disaster*, SPORTS ILLUSTRATED, Jan. 27, 1975, at 16.

3 *Id.*

4 See Kirkpatrick, *Shattered and Shaken*, SPORTS ILLUSTRATED, Jan. 2, 1978, at 46.

5 See Johnson, *A Walk on the Sordid Side*, SPORTS ILLUSTRATED, Aug. 1, 1977, at 12.

6 Benedict, *Pro Basketball . . . Is It a Violent Sport?* PETERSON'S PRO BASKETBALL, 1979-80, at 4.

mere fraction of the violent incidents in sports. This violence creates a sordid image which reflects on sports, and on the society as well:

The game [football] became contaminated, but the process was so gradual and so insidious that few took notice. From the kiddie leagues to the major colleges and professional leagues, the sport's public image grew more robust even as it decayed within. The injury rate mounted, sportmanship declined. Vicious acts became commonplace.<sup>7</sup>

Who controls violence in sports? Traditionally, sports violence has been controlled internally by means of game penalties, fines, and suspensions. Proponents of internal control argue that the sport's individual administrators<sup>8</sup> know better than anyone what conduct is reasonable and what risks the players do, in fact, assume. It has been suggested that the internal administrator's close contact with the development of the game and its players better enable him to regulate the level of violence.<sup>9</sup>

In view of the incidents mentioned above and others like them, it is clear that internal controls have failed to deal effectively with sports violence. These failures have brought to light the increasing need for societal control over the violence which occurs on the playing field. Violence in sports is a matter of grave societal concern. Admittedly, internal administration of such controls may be preferable. Given the past failures of internal control, however, society must not hesitate to intervene and deter violent behavior before its influence adversely affects other aspects of our lives. The District Court in *Hackbart v. Cincinnati Bengals, Inc.*<sup>10</sup> noted "that the question of community interest in limiting the violence in professional football concerns not only the protection of the participants, but also the effects of such violence on those who observe it."<sup>11</sup> The *Hackbart* court grimly recognized that the "the NFL has substituted the morality of the battlefield for that of the playing field, and the restraints of civilization have been left on the sidelines."<sup>12</sup> Clearly, if society is to function harmoniously, the "restraints of civilization" must be brought to bear on people in all professions, especially those in professional sports.

This Note will consider the available means by which society can control violence in team contact sports. More specifically, it will focus on the potential civil and criminal liability of players, coaches, management and game officials for violent behavior in sports.<sup>13</sup> This potential liability will be examined with respect to its value in permitting society to regain control over the conduct of those engaged in such sports.

7 Underwood, *An Unfolding Tragedy*, SPORTS ILLUSTRATED, Aug. 14, 1978, at 70.

8 The terms *sports administrators*, *sports authorities*, *league officials* and *league management* are used synonymously to refer to the governing bodies of a particular sport (e.g., NFL, NHL, NBA), or to bodies that govern sports in general (e.g., National Collegiate Athletic Association (NCAA)).

9 See Note, *Violence in Professional Sports*, 1975 Wis. L. Rev. 771, 784.

10 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir. 1979).

11 *Id.* at 357.

12 *Id.* at 358.

13 This Note will not consider contact sports played between individuals, such as boxing. Also, this will not consider legislative action as a possible source of societal regulation. Although it is a viable control, it will not be discussed because of the wide and varied course possible legislative controls might take. The author believes, however, that due to its general and compromising nature, legislative action is inferior to the *specific case* remedies afforded by a court of law. The *fact specific* nature of most acts of sports violence makes *fact specific* judicial resolution a more sensible means of control.

## II. Societal Control

### A. Civil Liability

#### 1. Intentional Torts

A defendant can be held liable for battery if he has done some positive and affirmative act with the intention of causing an unpermitted contact with the plaintiff and such contact results.<sup>14</sup> If, with the same intent, the plaintiff is put in "imminent apprehension" of a battery which does not occur, the defendant can still be liable for an assault.<sup>15</sup> Based upon an allegation of either assault or battery, a basketball player who was punched by an opponent,<sup>16</sup> a batter in a baseball game who was struck by the opposing team's catcher,<sup>17</sup> and a hockey player who had been intentionally hit in the face with a hockey stick by an opponent,<sup>18</sup> were able to recover from their assailants.

The main issue in litigation dealing with the question of assault or battery is not whether an intentional tort has been committed but is, rather, whether the plaintiff's recovery is barred by the equitable maxim *volenti non fit injuria*—"he who consents cannot receive an injury."<sup>19</sup> "One who enters into a sport, game or contest may be taken to consent to physical contacts, consistent with the understood rules of the game."<sup>20</sup> The player's consent, either express or implied, goes to the defendant's conduct, rather than to its consequences. However, the defendant's privilege is limited to the conduct to which the plaintiff consents, or at least to acts of a substantially similar nature.<sup>21</sup> "If the defendant goes beyond the consent given, and does a substantially different act, he is liable."<sup>22</sup>

Undoubtedly, a hockey player consents to an aggressive "check" into the boards. It is, and should be, "part of the game." It is similarly evident that the same hockey player does not consent to being intentionally struck in the face with the hockey stick of an irate opponent. This is not and never should be part of the conduct to which any athlete is deemed to consent.

#### 2. Negligence

The elements of a negligence cause of action are:

- 1) A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
- 2) A failure on his part to conform to the standard required;

14 See W. PROSSER, THE LAW OF TORTS § 9, at 34-37 (4th ed. 1971).

15 See *id.* § 10, at 37-41.

16 Griggas v. Clauson, 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955).

17 Averill v. Luttrell, 4 Tenn. App. 56, 311 S.W.2d 812 (1957).

18 Agar v. Canning, [1965] 54 W.W.R. 302, *aff'd*, [1966] 55 W.W.R. 384.

19 See generally 4 AM. JUR. 2d Amusements and Exhibitions § 86 (1962).

20 W. PROSSER, *supra* note 14 § 18, at 102.

21 *Id.* at 103.

22 *Id.* at 104.

- 3) A reasonably close connection between the conduct and the resulting injury; and
- 4) Actual loss or damage resulting to the interests of others.<sup>23</sup>

The otherwise tortious conduct of the defendant will not be deemed negligent when the plaintiff is found to have "assumed the risk."

[It may be stated as a general rule that voluntary, *sui juris* participants in a lawful sporting activity assume, as a matter of law, all of the ordinary and inherent risks in the sport, so long as the activity is played in good faith and the injury is not the result of an intentional or willful act.<sup>24</sup>

Under the doctrine of assumption of risk, football players have been found to assume the risks inherent in being tackled;<sup>25</sup> participants in a family softball game were held to assume the risk that during the course of the game someone might "slide" into a base;<sup>26</sup> and the "on-deck" batter in a baseball game was found to have assumed the risk of being struck by a bat which slipped from the batter's sweaty hands.<sup>27</sup>

[T]he general rule of assumption of risk will be inapplicable where the injured participant can establish that the injuries were either the result of other than good faith competition or the product of risks which are not ordinary or inherent in the sport in question. An unreasonable risk of injury may be created by the lack of skill or improper conduct of other participants or by the manner in which a particular activity is conducted. Such risks would not be assumed by the participant to the extent that they did not constitute the ordinary and inherent risks of the sport.<sup>28</sup>

In *Bourque v. Duplechin*<sup>29</sup> a second baseman in a softball game was held not to assume the risk that a base runner would go five feet out of the base path to "break up" an attempted double play.<sup>30</sup> The court in *Bourque* realized that a participant must be held to assume those risks incidental to the game which are obvious and foreseeable.<sup>31</sup> The court reasoned, however, "[a] participant does not assume the risk of injury from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating."<sup>32</sup>

Few sports cases can be found which have allowed the plaintiff to recover on a showing of mere negligence. This is due largely to the fear that imposition of liability in such cases would discourage participation in sports-related activities.<sup>33</sup> In *Bourque*, one of the cases in which recovery has been granted, the court spoke of a "reckless lack of concern," a standard which appears to re-

<sup>23</sup> *Id.* § 30, at 143.

<sup>24</sup> J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 8.02, at 936 (1979).

<sup>25</sup> *Vendrell v. School Dist. No. 26C, Malheur County*, 233 Or. 1, 376 P.2d 406 (1962).

<sup>26</sup> *Tavernier v. Maes*, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

<sup>27</sup> *Gaspard v. Grain Dealers Mut. Ins. Co.*, 131 So. 2d 831 (La. App. 1961).

<sup>28</sup> J. WEISTART & C. LOWELL, *supra* note 24, at 942.

<sup>29</sup> 331 So. 2d 40 (La. App. 1976), *cert. denied*, 334 So. 2d 210 (La. 1976).

<sup>30</sup> *Id.* at 42.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Note, *Injuries Resulting from Nonintentional Acts in Organized Contact Sports: The Theories of Recovery Available to the Injured Athlete*, 12 IND. L. REV. 687, 694, (1979).

quire more than mere negligence. Because application of a strict negligence standard to team contact sports would not only deter sports violence but participation in sports as well, requiring a showing of recklessness is the better approach.

### 3. The *Restatement* Position

Comment b of section 50 of the *Restatement of Torts* states:

Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.<sup>34</sup>

The most contentious issue in sports violence litigation centers on the degree to which a player consents to, or assumes the risk of, violent behavior from his competitors. The *Restatement (Second)* provides a workable standard by recognizing that a player accepts conduct which is permitted by the rules of the game but does not consent to conduct which violates a *safety rule*. The delineation between safety rules and rules the purpose of which is "merely to secure the better playing of the game as a test of skill" is a justifiable one. Prohibiting football players from "spearing"<sup>35</sup> one another, for example, serves only to deter violence and eliminate injuries. Liability based on such a violent tactic as "spearing" would neither inhibit the vigorous participation of athletes nor diminish the attraction of the game to the spectators. On the other hand, imposing tort liability on an offensive lineman who goes "offside"<sup>36</sup> would be disastrous. Such imposition would reduce every physical movement made by a player to a potential cause of action. This distinction, therefore, is solidly rooted in commonsense. For this reason, courts have increasingly seen fit to adopt its rationale.<sup>37</sup>

Comment b does not condition the applicability of its provisions on the status, professional or amateur, of the player. Although it has been argued by some<sup>38</sup> that professional athletes should be held to assume a greater risk and, therefore, be held to a lower standard of care, applying the restraint of the *Restatement (Second)* to amateurs and professionals alike is more practical and better serves the overall purpose of deterring sports violence. Whether conduct is reasonable should be judged by the nature of the game, its rules and other attending circumstances, such as the level of experience and expertise of the

34 RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965).

35 The NCAA football rules define *spearing* as "the deliberate use of the helmet in an attempt to punish an opponent." 1979 NCAA Football Rule 2, § 24, art. 1.

36 The NCAA football rules define *offside* as "the position of a player, . . . any part of whose person is beyond his scrimmage line or his restraining line when the ball is put in play." 1979 NCAA Football Rule 2, § 18, art. 1.

37 See *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir. 1979); *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975). See also text accompanying notes 39-53 *infra*.

38 601 F.2d 516 (10th Cir. 1979); Note, *supra* note 33, at 710.

players. Whether an athlete is paid for services is relevant only as indicative of the level of his experience and expertise. Also, such a distinction would result in an illogical classification. For instance, the standard expected of twenty-one-year-old college football players would be the same as ten-year-old "pee-wee" league players because both are "amateurs." After receiving their first NFL paychecks one year later, the ex-collegiate players will be held to a lower standard of care than their former teammates who are still in college. This distinction is illogical because violence is similarly dangerous in both professional and amateur athletics. Moreover, the highly visible conduct of professional athletes, may, in effect, set the standard of conduct for amateurs who may repeat what they see on television. To permit the paid athlete to demonstrate a lower standard of care is, therefore, counter-productive to any effort to reduce the level of violence in sports. The *Restatement (Second)* approach avoids this inconsistency.

#### 4. Impact of *Nabozny*, *Hackbart*, and *Tomjanovich*

Three recent cases have suggested the standard which courts will apply in dealing with tort claims arising out of team contact sports. These cases also reveal a willingness on the part of the courts to deal with these wrongs despite the fact that they took place within the confines of athletic competition.

In *Nabozny v. Barnhill*<sup>39</sup> the plaintiff, a goalkeeper in a soccer match, received permanent skull and brain damage when kicked by the defendant, a player on the opposing team. The incident took place inside the penalty area where any contact with the goaltender, regardless of intent, is a violation of the rules. The court prefaced its opinion by noting that the law should avoid placing unreasonable burdens on active participation in athletics. However, the court stated, "[W]e also believe that organized athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self-control."<sup>40</sup> The court held that in competitive sports in which 1) the competitors are trained and coached by knowledgeable personnel; 2) a recognized set of rules governs the conduct of the competition; and 3) safety rules are contained therein which are designed primarily to protect players from serious injury; the standard of care owed by a player to his fellow competitors is "to refrain from conduct proscribed by a safety rule."<sup>41</sup> According to the court, liability in tort will result when a player's "conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player."<sup>42</sup> The court remanded the case for a jury determination of the issues of defendant's negligence and plaintiff's contributory negligence.

The *Nabozny* court's emphasis on safety rules was derived from the distinction drawn by Comment b of section 50 of the *Restatement (Second) of Torts*.<sup>43</sup> As

39 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

40 *Id.* at 215, 334 N.E.2d at 260.

41 *Id.*

42 *Id.* 334 N.E.2d at 261.

43 See text accompanying notes 34-38 *supra*.

previously mentioned, it is believed that this distinction serves as a useful tool for measuring the extent of a participant's consent. The court also rejected the mere negligence standard and opted for the "reckless disregard" standard mentioned above. This standard requires a showing of more than mere negligence but does not require evidence of a specific intent to injure.

Significantly, the *Nabozny* court noted that it did not want to impede athletic participation but emphasized that every athlete must come to the playing field subject to some of the "restraints of civilization."<sup>44</sup> The court properly recognized that sports serves society, not vice versa. Many valuable lessons are learned in athletics, among them leadership, pride, hard work, cooperation, and sportsmanship. Society should not, and cannot, tolerate the erosion of these benefits by allowing unrestrained violence, which benefits no one and injures many.

In *Hackbart v. Cincinnati Bengals, Inc.*,<sup>45</sup> the plaintiff, a free safety for the Denver Broncos, received a broken neck as a result of an altercation with the defendant, Charles "Booby" Clark, a Bengal running back. Following an interception by one of his teammates, Hackbart fell to the ground after attempting to block Clark. Hackbart turned and with one knee extended watched the play continue upfield. While Hackbart knelt, Clark stepped forward and struck a blow with his right forearm to the back of Hackbart's head with sufficient force to cause both players to fall to the ground. No comment was made and the players returned to their sidelines. Because no official had witnessed the incident no penalty flag was thrown and the injury was not discovered until later.<sup>46</sup>

Booby Clark's conduct clearly violated article 1, item 1, subsection C of the NFL rules which provides: "All players are prohibited from striking on the head, face, or neck with the heel, back or side of the hand, wrist, elbow, forearm or clasped hands."<sup>47</sup> The district court in *Hackbart* found that the plaintiff had assumed the risk of Clark's act.<sup>48</sup> Further, the district court noted the violence in professional football, but ruled as a matter of policy that conflicts occurring on a professional football field were not properly resolved in the courts.<sup>49</sup>

On appeal the Circuit Court of Appeals for the Tenth Circuit reversed: "Contrary to the position of the [district] court, . . . there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."<sup>50</sup> Further, the court noted:

The general customs of football do not approve the intentional punching or striking of others. . . . Punching or hitting with the arms is prohibited. Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another. Therefore the notion is not correct that all reason has been abandoned,

44 31 Ill. App. 3d at 215, 334 N.E.2d at 260.

45 435 F. Supp. 352 (D. Colo., 1977), *rev.d.*, 601 F.2d 516 (10th Cir. 1979).

46 *Id.*

47 601 F.2d at 521.

48 435 F. Supp. at 356.

49 *Id.* at 357.

50 601 F.2d at 520.



whereby the only possible remedy for the person who has been the victim of an unlawful blow is retaliation.<sup>51</sup>

The Tenth Circuit went on to find that Clark had demonstrated "reckless misconduct" in his disregard of the duty he owed to his fellow players.<sup>52</sup> Clark's conduct, according to the Court, was more than mere inadvertence even though he lacked the specific intent to injure required for an action for assault or battery.<sup>53</sup> *Hackbart* is consistent with the growing line of authority, first seen in *Nabozny*, which prohibits athletes from acting in reckless or willful disregard of rules designed to promote the safety of the players. The Tenth Circuit transmitted a sobering message to the sports establishment—if they cannot keep their own house clean, the courts will not hesitate to do it for them.

In *Tomjanovich v. California Sports, Inc.*,<sup>54</sup> the jury awarded Rudy Tomjanovich \$3,246,376.00 (\$1,746,376.00 in actual damages and \$1,500,000.00 in punitive damages). The action stemmed from the "punch heard 'round the world." On December 9, 1977, Tomjanovich, of the Houston Rockets, was rushing to break up a fight between his teammate Kevin Kunnert and Kermit Washington, of the Los Angeles Lakers, when the latter turned and landed what Laker assistant coach Jack McCloskey called "the hardest punch in the history of mankind."<sup>55</sup> Tomjanovich suffered multiple fractures of the face and skull, severe lacerations around the mouth and a cerebral concussion.<sup>56</sup> The jury found that Washington had committed a battery and had acted with "reckless disregard for the safety of others."<sup>57</sup>

The *Tomjanovich* case is important for two reasons. First, since the judgment came from a jury, the enormous damage award evidences the degree of societal concern with violence in sports. These jurors were, arguably, representative of the people who watch sports in person and on television, who have participated in their youth and whose children now participate. Their verdict is an indication of a societal consciousness which will no longer tolerate the type of extreme violence exhibited in the Tomjanovich-Washington incident.

Secondly, this case was unique since California Sports, Inc., owner of the Lakers and Washington's employer, was the defendant in the suit rather than the player himself. Its eventual liability was based on the theory that it was negligent in retaining Washington after it became aware that he had a tendency for violence while playing basketball.<sup>58</sup>

It is arguable that the large jury award in *Tomjanovich* was the result of jury willingness to deal severely with corporations. Tomjanovich, undoubtedly, found the "deepest pocket" to sue and probably would have recovered less against Washington than he did against California Sports, Inc. Three million dollars, taken in the context of sports violence liability is, nonetheless, a very severe sanction whoever the defendant may be.

<sup>51</sup> *Id.* at 521.

<sup>52</sup> *Id.* at 524.

<sup>53</sup> *Id.*

<sup>54</sup> *Tomjanovich v. California Sports, Inc.*, No. 78-243 (S.D. Tex. Aug. 17, 1979).

<sup>55</sup> Kirkpatrick, *supra* note 4, at 46.

<sup>56</sup> *Id.*

<sup>57</sup> Woolf, *Courts Coming Down Hard on Excessively Violent Players*, NAT'L L.J., Jan. 7, 1980, at 20.

<sup>58</sup> The plaintiff introduced evidence showing that Washington had nine fights in four years. See *SPORTS L. REP.*, Aug. 1979, at 1.

Holding the owner liable presents the most effective deterrent to sports violence. If damage awards of this size are the price of employing the so-called "enforcers," owners may begin to find it more advantageous to return to employing players who specialize in the "skills of the game" rather than in the "skills of the barroom."

Reflecting on the *Hackbart* and *Tomjanovich* decisions, Bob Woolf, a respected attorney who practices in the area of sports law, noted: "The cases indicate a more reasonable trend of thinking toward malicious actions which increase only the danger, and not the interest level, in sports. The strong positions taken by the two different courts should, hopefully, serve as an effective deterrent on intentional violence in sport."<sup>59</sup>

### B. Criminal Sanctions

Assault and battery is a wrong not only against another human being but against society as well. Hockey players Wayne Maki, Ted Green, and Dave Forbes have each faced criminal prosecution for acts of violence done in the heat of athletic competition.<sup>60</sup> Theoretically, the team executives should be attempting to quell violence in their sport. Very often, however, the opposite seems to be the case. In early 1975 Dave Forbes, of the Boston Bruins, was indicted by a grand jury for his vicious attack on the Minnesota North Stars' Henry Boucha.<sup>61</sup> Rather than expressing concern over the conduct of his employee, Harry Sinden, managing director of the Bruins, said: "If Forbes is convicted of anything, we'd have to think about letting Bobby Orr, Phil Esposito and all our other players ever skate in Minnesota again."<sup>62</sup> The lack of seriousness with which Sinden and other sports administrators view these acts underscores the need for societal control. Putting an athlete on trial for assault and battery is an undesirable alternative but one that must be exercised if internal controls and civil liability fail as effective deterrents.

The elements of the crime of battery are: 1) an act by the defendant; 2) an intent to injure; and 3) some harmful result to the victim.<sup>63</sup> "The problem facing prosecutors in changing athletes with criminal code violations is the nature of many sporting events, wherein players consent to being assaulted as part of the game itself."<sup>64</sup> Consent in the criminal context is similar to, and represents many of the same problems, which attend the issue of consent in the tort context. Application of the consent defense under the criminal law requires two steps. First, society must decide, as a matter of public policy, whether consent is to be a defense to the act in question. There are some acts, particularly egregious in nature, to which society will not permit a person to consent. Secondly, if the defense is allowed, the court must determine its legal effectiveness under the facts of the case.<sup>65</sup>

<sup>59</sup> Woolf, *supra* note 57.

<sup>60</sup> State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Jud. Dist., judgment of mistrial entered, Aug. 12, 1975); Regina v. Green, [1970] 16 D.L.R.3d 137; Regina v. Maki, [1970] 14 D.L.R.3d 164.

<sup>61</sup> See text accompanying note 2 *supra*.

<sup>62</sup> Mulvoy, *supra* note 2, at 16.

<sup>63</sup> See generally W. LA FAVE & A. SCOTT, JR., CRIMINAL LAW § 81 (1972).

<sup>64</sup> Hechter, *The Criminal Law and Violence in Sports*, 19 CRIM. L.Q. 425, 433 (1977).

<sup>65</sup> Note, *The Consent Defense: Sports, Violence and the Criminal Law*, 13 AMER. CRIM. L. REV. 235, 238 (1975).

Presuming the availability of consent as a defense to batteries which are "part of the game, "no athlete should be presumed to accept malicious, unprovoked, or overly violent attack."<sup>66</sup> The opinions in *Regina v. Green*<sup>67</sup> and *Regina v. Maki*<sup>68</sup> reiterate expressly or by implication the established principle that there is a limit on the magnitude and the dangerousness of a blow to which another is permitted to consent.<sup>69</sup> "[I]t is up to the jury, by determining the extent of any such consent, to define the scope of the conduct which will be legally tolerated by society in such athletic contests."<sup>70</sup>

If a hockey fan forcefully shoves another in the arena parking lot, he can be prosecuted for assault and battery. Why, then, should a hockey player who maims an opponent with his stick inside the arena be applauded as being "aggressive"? Prosecutors would have little difficulty proving the elements of assault and battery in most cases of sports violence. "[T]he athlete's tacit immunity, therefore, must be largely attributed to nonlegal factors affecting the discretionary decision not to prosecute."<sup>71</sup> These nonlegal factors center around the traditional notion that if any discipline is needed in sports the sports administrators are best equipped to apply it by internal means. Indeed, as evidenced by the district court in *Hackbart*, the legal system has sometimes acted as if sports are outside the realm of judicial control.<sup>72</sup> Judicial restraint in dealing with sports violence cases is a valid policy only when internal controls are successful. When internal restraints falter, however, every legal recourse must be available to control that which society will not tolerate. "The difficult question is when is sports misconduct serious enough to make the arguments for legal control more persuasive than those for internal control?"<sup>73</sup> Due to the special characteristics of different sports at various levels of competition, this question, by necessity, must be answered on a case-by-case basis.

### III. Liability of Nonplayers

Civil and criminal liability have been discussed as they pertain to the duty owed by one player to another. The possibility of imposing similar liability on coaches,<sup>74</sup> management and game officials provides alternative methods of deterring sports violence.

The district court in *Hackbart* found that coaches in professional football "make studied and deliberate efforts to build the emotional levels of their players to what some call a 'controllable rage.'"<sup>75</sup> Testifying before the same court, John Ralston, coach of the 1973 Denver Broncos, stated that:

<sup>66</sup> *Id.* at 241.

<sup>67</sup> [1970] 16 D.L.R.3d 137.

<sup>68</sup> [1970] 14 D.L.R.3d 164.

<sup>69</sup> Note, *supra* note 65, at 241.

<sup>70</sup> Note, *Criminal Law: Consent as a Defense to Criminal Battery—The Problem of Athletic Contests*, 28-OKLA. L. REV. 840, 845 (1975).

<sup>71</sup> Note, *supra* note 9, at 778. See also *id.* at 779-85 for a good discussion of nonlegal factors affecting a prosecutor's decision not to prosecute.

<sup>72</sup> 435 F. Supp. at 357-58.

<sup>73</sup> Note, *supra* note 9, at 789.

<sup>74</sup> Most tort actions which have named coaches as defendants have involved claims of negligent instruction or supervision. See, e.g., *McGee v. Board of Educ.*, 16 App. Div. 2d 99, 226 N.Y.S.2d 329 (1962). This Note will limit its consideration to the coach's role in sports violence and not deal with negligent instruction.

<sup>75</sup> 435 F. Supp. at 355.

[T]he pre-game psychological preparation should be designed to generate an emotion equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the side of a mountain road. The precise pitch of motivation for the players at the beginning of the game should be the feeling of that father when, after overtaking and stopping the offending vehicle, he is about to open the door to take revenge upon the person of the other driver.<sup>76</sup>

This kind of intense preparation has an incredible effect on the performance of players at any level, professional, collegiate or high school. Dean Payne, a former linebacker at Northwestern, says, "Some coaches stress gang tackling. You're taught to be there at the ball, and once you're there you're supposed to pile on until the whistle blows. It can become a violent state of mind—you can really get fired up and motivated to get someone."<sup>77</sup>

Because of the great influence and the direct control they have over their players, coaches may be held civilly or criminally responsible for the conduct they encourage. Civil liability can be based on principles of agency; where a principle intends the conduct or consequence of an agent's act, the principle is subject to liability.<sup>78</sup> Criminal responsibility might reach coaches through conspiracy statutes.<sup>79</sup>

There is some evidence to support the inference that injuries in sports are the result of instructions from coaches or employers who want opposing athletes "taken out" of the contest. Such conspiracies do not require that serious injury or bodily harm results before leaving the conspirator's subject to criminal prosecution. . . . When fellow players and coaches overtly conspire to do injury to the opposition, they conspire to commit crimes and should be subject to prosecution.<sup>80</sup>

Any measure designed to control violent acts by players, whether imposed internally or by society, will have little lasting effect unless it addresses itself to the root of this evil—the "win at all costs" philosophy. Within this ethic, violence is merely a strategic tool utilized to realize the ultimate goal of victory.

Equally culpable under the "win at all costs" doctrine are the owners and/or management of professional teams and possibly the athletic associations or school administrations of universities and high schools.

In general, owners can be held liable under the same theories as a coach; civil liability being predicated on agency principles<sup>81</sup> and criminal liability on conspiracy statutes.<sup>82</sup> In *Averill v. Luttrell*,<sup>83</sup> the defendant Nashville Baseball Club was exonerated of liability for the assault and battery committed by their employee, Averill, who had struck and injured the plaintiff during a baseball game. The court reasoned that the assault and battery by Averill,

76 *Id.*

77 Underwood, *Punishment Is a Crime*, SPORTS ILLUSTRATED, Aug. 21, 1978, at 32.

78 See Note, *supra* note 9, at 776.

79 *Id.*

80 Hechter, *supra* note 64, at 434-36.

81 See Note, *supra* note 9, at 776.

82 *Id.*

83 See 4 Tenn. App. 56, 311 S.W.2d 812 (1957).

was no part of the ordinary risks expected to be encountered in sportsmanlike play. Nor was there any proof showing that the assault was other than a willful independent act on Averill's part, *entirely outside the scope of his duties*. The assault was *neither incident to nor in furtherance of his employer's business*, and under the circumstances we think that the Nashville Baseball Club would not be liable under the doctrine of respondeat superior.<sup>84</sup>

The key phrase in the exoneration of the defendant is "*in furtherance of his employer's business*." It is believed that, contrary to the Averill court's implication, violence is often a part of the employer's business.

A successful "business" in term contact sports has two characteristics: high attendance figures and winning records. In most cases, the former condition is determined completely by the existence of the latter. Spectators have not patronized losing teams, therefore, if owners are to succeed in the attendance sweepstakes they must provide a winning team. Faced with the prospect of losing records due to the absence of skilled players, owners have taken to "tactical violence" as a means of achieving victory. This has been achieved, basically, by employing players who specialize in the intimidation of the opposition by the use or threat of physical violence, the so-called "enforcers." The intimidating presence of "enforcers" in hockey, basketball and football has carried teams with comparatively little talent to championship seasons. Not surprisingly, attendance flourishes and the business is deemed successful. In light of the impact the "enforcers" have on the success of the business, their violent acts should be viewed as being "*in furtherance of their employer's business*." Certainly justice will not permit an employer to profit from the violent acts of his employees and then allow him to escape liability when these acts cause injuries to other players. Indeed, the three million dollar jury award given in *Tomjanovich* against the owners of the Lakers evinces a recognition of an owner's responsibility for the tortious acts of his employee when the owner is fully aware of his violent tendencies.

Owners and other management personnel might also find themselves subject to criminal liability as part of the conspiracy involving the coach and the players.

Under this theory liability can be imposed upon one who has declared his allegiance to a particular common object [*i.e.*, winning by resort to intentional batteries outside the scope of the game], has implicitly resorted to the commission of foreseeable crimes in furtherance of this object, and has himself collaborated with his coach and players, giving support to the co-conspirators.<sup>85</sup>

Once again it must be emphasized that controls imposed upon players will only be effective if they are successful in deterring owners and coaches as well. As long as employment of violent tactics, and the coaches who teach them, prove to be beneficial to owners, they will continue to use them regardless of the restrictions placed on players. The root of sports violence goes much deeper than the playing field and effective controls must recognize and deal with the true sources of the problem.

<sup>84</sup> *Id.* (emphasis added).

<sup>85</sup> Hechter, *supra* note 64, at 435.

Another alternative which an injured player has is to allege a negligence action against an official. A valid claim against an official would probably require a showing of recklessness similar to other situations when negligence is charged.

Few men and women would be willing to officiate athletic contests if their mere negligence could result in their incurring personal liability for injuries sustained by players. Courts have endeavored to avoid discouraging the free participation in sports.<sup>86</sup> Similarly, a balance should be drawn so that officials are held accountable for reckless conduct while not discouraging their participation. The duty required of an official to avoid such tortious liability should be the diligent enforcement of all safety rules. This does not mean that an official would incur liability if he fails to call every violation that occurs on the field. An official would be held liable only when he acts in willful or reckless disregard of his duty to enforce that safety rules of the particular game.

In *Carabba v. Anacortes School District No. 103*<sup>87</sup> the defendant referee was found negligent in his supervision of a high school wrestling match.<sup>88</sup> During the course of the wrestling match, the referee had turned from the action to repair the wrestling mat. While the referee was distracted, the plaintiff's opponent applied an illegal "full nelson" which caused the severance of a major portion of the spinal cord and rendered the plaintiff permanently paralyzed.

*Carabba* is important in that, first, it raises the possibility of imposing liability on an official for failure to supervise properly an athletic contest. Although negligent conduct was sufficient for holding the referee liable in *Carabba*, recklessness would be the more appropriate standard.

Second, and more importantly, the court in *Carabba* found a master-servant relationship between the school district and the referee. The court found that under these circumstances the school district owed a duty to the student participants.<sup>89</sup> The court reasoned that

[O]ne may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of the protection is delegated is careful in giving the protection. [Here], the duty is non-delegable.<sup>90</sup>

The court concluded, therefore, that "if the referee was negligent, the school district must, as a matter of law, respond in damages."<sup>91</sup> Applying this reasoning to violence in professional sports, if referee liability could be established, it would appear that an injured player could maintain a claim for damages against the NFL, NHL, or NBA under the master-servant theory espoused in *Carabba*. The leagues, and the owners who constitute its hierarchies, have failed repeatedly to deal with sports violence. Because the leagues and owners have derived the greatest economic benefit from spectator attraction to sports violence, requiring them to defend a tort action resulting from this violence

86 See 39 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

87 72 Wash. 2d 939, 435 P.2d 936 (1967).

88 Although wrestling is not a team contact sport, *Carabba* is useful in exhibiting the standard of care required of referees in sporting events.

89 See 72 Wash. 2d at 435 P.2d at 947.

90 *Id.* at 948.

91 *Id.*

might be a very fitting form of justice. The spectre of this liability would also cause the leagues to deal more strictly with the problem of violence, so as to avoid any damage to their image as a respected sporting activity.

#### IV. Reflections and Recommendations

Acts of violence have increased on the playing fields and in the arenas in the United States and Canada. Unfortunately, however, this problem is not left on the playing field. In his book *Sports in America* James A. Michener wrote:

Within recent years the new frontier created by urban disruption has produced shocking levels of violence. I have just seen a report which states that in American schools last year there were 204,000 instances in which students beat up their teachers in the classroom, 9,000 cases of rape in washrooms, and about 100 murders during school hours. Such conduct is incredible, and there had better be a retreat from this dangerous addiction. One place to start would be sports, both in the way they are played and in the behavior of the spectators. Ice hockey and football have become too violent, and they set a deplorable example for other sports.<sup>92</sup>

Sports violence does not occur in a vacuum. Large numbers of people witness sports violence, either in person or via television, many of whom are children. These impressionable young spectators have been shown to be tempted to imitate the action of their sports "heroes." According to a report done by three physicians, there exists an "Evil Knievel syndrome"—imitation of exhibitionism in sports. That study concluded that "televised violence, especially during sporting events and news reporting, is increasingly implicated in imitative and aggressive behavior exhibited by children."<sup>93</sup> A separate study of violence in Canadian amateur hockey included accusations that professional hockey's use of violence as a "tactical instrument" outside of the rules contributed greatly to the use of violence among amateurs.<sup>94</sup>

Regardless of the medium by which sports violence is witnessed, the overall danger to society is the same.

When moral rules are bent, more than sport is mangled. In the end, it is not the players who are cheapened and injured, nor even the event itself. It is the children and adults who watch and then repeat what they see on the playground and in the stands—and perhaps in their lives.<sup>95</sup>

Action must be taken to abate sports violence. Theoretically, measures taken by sports authorities and applied internally are preferred to societal controls imposed through the legal system. Internal controls, however, have proven inadequate. In football, for example, the primary sanction for a violation of the rules is the loss of yardage, the amount being contingent upon the particular infraction. In particularly egregious situations, players are subject to ex-

<sup>92</sup> J. MICHENER, *SPORTS IN AMERICA* 436 (1976).

<sup>93</sup> Kanfer, *Doing Violence in Sport*, *TIME*, May 31, 1976, at 64.

<sup>94</sup> Hechter, *supra* note 64, at 427.

<sup>95</sup> *Id.*

pulsion from the game and, in the case of paid professionals, to monetary penalties imposed by the league commissioner.<sup>96</sup>

Increasing violence suggests, however, that monetary penalties imposed by the professional leagues have been ineffective in deterring violence on the field. The amount of the fines in relation to the possible rewards of violence indicates why monetary penalties have proven ineffective. NFL Commissioner Pete Rozelle fined George Atkinson \$1500 for his celebrated "cheap shot" of Lynn Swann.<sup>97</sup> Atkinson is a highly paid athlete whose intimidating style of play contributes greatly to the success of his team. If Atkinson and his teammates are successful in their intimidation campaign, they will be rewarded with play-off money, possibly as high as \$25,000 per player. The financial disincentives to violence are clearly inappropriate. In light of Atkinson's potential earnings for being a "hit man," it is highly unlikely that a \$1500 fine will deter him, or others, from unrestrained violence.

Various theories have been proposed to explain the cavalier attitude with which sports authorities have approached this problem. Some league officials believe that the imposition of increased sanctions will alter the basic nature of the game. Many of these officials also see a potential for disruption of league solidarity when sanctions are imposed on one player or teams and not on another. Another theory views professional leagues as profit-seeking entities, cognizant only of the fact that violence "sells tickets" and oblivious to the hazards which accompany such a philosophy. The simplest explanation is that sports authorities merely do not believe they have a problem.

Whatever the reason or attempted justification for the lack of effective internal control, the conclusion is clear—society must intervene and enforce a level of conduct which is reasonable.

There are no brass bands or waving pennants in the courtrooms and emergency wards. With a gangland mentality allowed on the field and with a sport whose leadership is more responsive to Nielson ratings than injury reports, it is small wonder that the wolves (mostly lawyers) are at football's door. "Litigation is waking people up" says [Dr. Kenneth] Clarke, [founder of the National Athletic Injury/Illness Reporting System]. "Litigation will be the cause of change." When owners are convinced that injuries are costing them money they will push for reform.<sup>98</sup>

It is imperative that action be taken now to abate sports violence. Failure to take prompt action may result in a generation of "Little enforcers," youths who imitate and grow to accept the violent ways of their "heroes."

Operationally, internal and societal controls should be toughest on coaches and owners.

Coaches are not monsters. As a group they are probably more honorable and caring than most. The great majority think of their calling as a high one, entrusted as they are with the development of young men. But coaches at almost every level, from high school up, are under great pressure to win.<sup>99</sup> The em-

96 435 F. Supp. at 354.

97 See text accompanying note 5 *supra*.

98 Underwood, *Speed Is All the Rage*, SPORTS ILLUSTRATED, Aug. 28, 1978, at 38.

99 Underwood, *Football's Unfolding Tragedy*, READER'S DIGEST, Sept. 1979, at 96.



phasis on winning has given rise to a "win at all costs" philosophy which creates an atmosphere where undue violence is more likely to occur.<sup>100</sup>

In response to the need to "win at all costs," some coaches will allow players to "get away with what they can" in terms of conduct proscribed by the rules. From the philosophy of "get away with what you can," malicious and unrestrained violence is soon to follow, deviations which pervert sport.<sup>101</sup> What should be the response to coaches who instruct their players to violate the rules? If coaches do not teach good sportsmanship, they must be responsible for the acts of bad sportsmen.<sup>102</sup> Civil and criminal liability exist as possible deterrents to the coach who would encourage violent play in an effort to gain a tactical advantage. Ideally the preferable response to this type of coaching philosophy would be meaningful fines, seasonal expulsion or banishment from the game entirely. The sports establishment must be made to realize that drastic steps may be necessary.

Owners, like coaches, should be provided with effective deterrents. Many in sports management believe that violence is necessary to the game. They not only condone it but encourage it, because violence creates fan interest and, therefore, sells tickets.<sup>103</sup> It is the management who solicits, hires, and tolerates coaches who teach violent tactics. Therefore, they may be the most culpable of all. Evidently the jury that awarded Rudy Tomjanovich \$1,500,000 in punitive damages against California Sports, Inc. found this to be the case.

Owners and managements who tolerate violence being promoted by coaches or performed by players within their employ, must be held accountable. The possibility of civil and criminal liability should serve as some deterrence. Internally, heavy fines, season expulsion and banishments are viable measures. The severity should be increased, however, so as to be commensurate with the heightened culpability of the owners.

In an effort to curb violence once the players reach the field, game officials should enforce the rules more strictly. Despite the need for having a "tight game" called in the NFL, the opposite has been the case. According to one NFL coach, "As you progress up the ladder from high school to pro, you see officials grow more liberal in their interpretation of the rules, and that is a dangerous thing."<sup>104</sup> Actually, because the potential for violence seems to increase with the level of competition, commonsense suggests that the rules be enforced more stringently in professional sport than at lower levels.

Imposing civil liability on referees would be an effective sanction if the league itself were found liable under a master-servant relationship. Internally, league officials should encourage referees to enforce the rules more strictly. Additionally, the various leagues should impose more stringent age and physical condition requirements on game officials. Effective supervision by referees must be a component of any plan to combat sports violence. In setting forth referee "fitness" requirements, cognizance must be taken of the player/official

100 Woolf, *supra* note 57.

101 Underwood, *supra* note 77, at 35.

102 *Id.* at 53.

103 See Woolf, *supra* note 57.

104 Underwood, *supra* note 77, at 40.

ratio and age and physical ability disparities between player and officials. Referees are trying to control contests in which the player to official ratio ranges from four to one in football to six to one in hockey. Each of these players are in better physical condition and possess athletic abilities which greatly exceed that of the official. If the league, therefore, has any hope of controlling this fast-paced action and the violence which it has bred, the officials must be in "top shape."

To some extent, the players who commit acts of sports violence are the real victims; victims of a system which they really don't understand. For most players violence in competition become personally acceptable at a very young age. These youths were products of a system that rarely allowed them an opportunity to question the ethics of their actions on a playing field. In the majority of cases, unfortunately, the only enduring ethic was embodied in the final score. Years later, after his actions have seriously injured someone it is hardly surprising that a player claims his conduct was "part of the game." In the abstract his conduct certainly is unacceptable. As a practical matter, however, players rarely invent violent techniques and are merely playing the game the way society has allowed it to be taught to them.

Nonetheless, as members of society, however, players must become more responsible for their behavior. Failing this responsibility, the internal and societal controls previously mentioned for coaches and owners would be equally applicable to players.<sup>105</sup>

It is possible that the high level of violence in sports today properly reflects society. Michener said that American sports are especially violent because they are forced to reflect the inherent violence of our society.<sup>106</sup> The question is raised, does violence in society cause violence in sports or vice versa? If violence in sports precipitates violence in society, steps must be taken by the community to cure this ill and bring its conduct within an acceptable norm. Conversely, if violence in society gives rise to violence in sports, efforts must be aimed at diminishing violence on an individual and societal level. Under the latter theory, sports would serve as a barometer for measuring the effectiveness of efforts designed to curb violence in the society at large.

Under either theory, it is clear that as individual members of society we must dismiss the hypocritical approach sometimes taken in regard to violence in the community at large. Tolerating violence in the home while condemning

<sup>105</sup> One area of player conduct warrants note. League and team officials, as well as players, must move to eliminate the use of amphetamines by players as a means of "getting up" for a game. According to Dr. Arnold Mandrell, author of *The Nightmare Season*, a book recounting his experiences as team psychiatrist for the NFL San Diego Chargers, amphetamines are:

the single factor that causes unnecessary violence in pro football today. . . . The normal "diet" pill or capsule—Benzedrine, Dexedrine, Eskatrol—contains 5 to 15 milligrams of amphetamine. The prolonged, excited "high" from one pill is familiar not only to fat people but also to long-haul truckers and students cramming for examinations. Imagine what it is like to gulp down 30 pills at one time. The result is a prepsychotic paranoid rage state. A five-hour temper tantrum that produces the late hits, the fights, the unconscionable assaults on quarterbacks that are ruining pro football.

Underwood, *supra* note 98, at 32.

In the NFL the "win at all costs" intensity, the amphetamines and the high physical properties of the game all combine to produce a type of "war ethic." See Underwood, *supra* note 76, at 36. It is time that we make a move to replace this ethic with one that better reflects the needs and expectations of society.

<sup>106</sup> J. MICHENER, *supra* note 92, at 436.

its occurrence in a football game will not, in the long run, cure any societal ills. Action must be taken presently to root violent behavior out of *all* aspects of society. Only then can we hope to have restored complete dignity to our sports programs and to our society as well.

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